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Via HAND DELIVERY

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals – TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation – In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions, CS Docket No. 00-2

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules and regulations, 47 C.F.R. § 1.1206, the purpose of the letter is to report that an *ex parte* meeting occurred on October 4, 2000 between representatives of EchoStar Satellite Corporation ("EchoStar") and the following:

| | |
|---------------|-----------------------|
| Deborah Klein | Cable Services Bureau |
| Eloise Gore | Cable Services Bureau |
| Ron Parver | Cable Services Bureau |

At the meeting, the EchoStar representatives inquired about the status of these proceedings, discussed the enormous logistical difficulties and complexities that network nonduplication ("nondup"), syndicated exclusivity ("syndex"), and sports blackout rules (collectively "blackout rules") will create for providers of satellite programming, and the resulting hardship for consumers. In brief, blackout requests under the rules will most likely mean that EchoStar will have to discontinue completely retransmissions of the affected "nationally distributed superstations," either throughout an exclusion zone or throughout the nation. As a result of the rules, a significant percentage of the more than 700,000 EchoStar

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subscribers currently receiving EchoStar's superstation package, or possibly all of these subscribers, will lose some or all of the nationally distributed superstations. EchoStar will need time to determine how many of these subscribers will need to lose how many of these superstations. That determination depends very largely on the number and geographic pattern of blackout requests. EchoStar will also need time to minimize the disruption of service for these valued customers and the customer dissatisfaction that would ensue otherwise by, among other steps, developing attractive replacement packages. For these reasons, EchoStar requests a one-year transition period similar to the one the Commission afforded cable operators, a 90-day window for compliance with blackout requests, and a grandfathering of all customers that subscribed to the superstation package at least prior to the November 29, 1999 passage of SHVIA.

Minimum One-Year Transition Period. The realities of the statutory requirements are inexorable. Because satellite providers cannot simply have the same programming turned on and off in different parts of an intricate patchwork spanning the entire country, EchoStar fully expects that it will have to discontinue retransmission of some or all superstations, for some or all of its subscribers. Obviously, EchoStar would like to be able to preserve as many superstations as possible for as many of its over 700,000 subscribers receiving that programming now as possible. To make determinations in that regard, however, EchoStar simply needs time to assess the number of blackout notices it receives and the geographic pattern of exclusion zones dictated by these notices. A transition period of at least one year will allow EchoStar to make that assessment. It will also permit EchoStar to develop alternative programming packages for affected subscribers and reduce disruption and discontent. During the transition period, broadcasters with appropriate exclusivity rights would be allowed to send notices to the satellite operator (which would allow the evaluation of the number and geographic pattern of the notices and the extent of the affected superstations), but compliance with these notices would effectively be tolled for one year from release of the Commission's rules. In implementing the blackout rules for cable systems, the Commission deemed a one-year transition period to be appropriate and in the public interest for precisely these reasons. *See In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299, 5317 (1988) (explaining that a one year transition period would allow cable systems and others "sufficient time to respond to the requirements placed upon them by syndicated exclusivity"). Indeed, the Commission subsequently extended the transition period for cable systems by an additional six months "to ensure that cable operators [were] . . . provided ample opportunity to assess and adapt to the immediate burdens of complying with [the] . . . syndex rules." *In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 4 FCC Rcd. 2711, 2722 (1989). Accordingly, EchoStar submits that a transition period of at least one year is equally necessary in the satellite context.

90-Day Time Period for Compliance with Blackout Requests. Under the cable nondup and syndex rules, the distributor must comply with an adequate blackout request on the first day of the calendar week that begins 60 days after it receives the notice. This time period is

very restrictive in light of both the need to minimize disruption to existing subscribers to the superstation package (as discussed above) and the need to accommodate new subscribers. Specifically, EchoStar pre-bills new subscribers for 60 days' worth of programming. With a 60-day blackout notice period, EchoStar would have to completely bar these new subscribers from receiving a superstation even before the 60-day period has run out, effectively truncating that period. If, for example, EchoStar receives a blackout notice and signs up a new subscriber 5 days thereafter, it cannot prebill that subscriber for the affected superstation, and therefore it would not be able to allow the subscriber to receive the programming at all, even though the subscriber would otherwise be able to receive the programming for 55 days or more. In addition, the translation of blackout requests into a determination as to whether or not to prebill a particular new subscriber for certain programming is an extremely cumbersome process that takes time. A "90-day plus" compliance period (instead of the "60 plus" rule applicable to cable) would somewhat alleviate these problems.

Grandfathering. As an alternative or complement to the transition period, and to minimize what could be a monumental disruption to EchoStar's current superstation subscriber base of more than 700,000 viewers, the Commission should only apply the nondup and syndex rules prospectively, in essence protecting or "grandfathering" those viewers who subscribed to superstation packages up to the date the Commission promulgates a final rule. The equities weigh heavily in favor of a grandfathering provision in this circumstance. Without grandfathering, satellite superstation subscribers face blacked-out screens instead of the programming they desired and expected when they subscribed. This is surely not the result Congress intended in enacting the Satellite Home Viewer Improvement Act of 1999. At an absolute minimum, satellite superstation subscribers as of the enactment date of SHVIA should be grandfathered (of course, if the grandfathering extends only to that date, a minimum one-year transition period would still be necessary). In circumstances in which the public interest would be harmed as a result of Commission action, the Commission in numerous other instances has instituted grandfathering to minimize the harm. *See, e.g., In the Matter of Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221 (rel. Aug. 6, 1999) (setting forth the Commission's television LMA grandfathering policy adopted as part of the Commission's recently revised ownership rules); *see also In the Matter of Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd. 19112, 19181-83 (1998) (grandfathering existing instructional television fixed service excess capacity lease agreements to minimize disruption caused by the need to comply with the Commission's new ITFS rules). The Commission should do the same here.

Ms. Magalie Roman Salas
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An original and one copy of this letter are submitted to be included in the above-captioned docket.

Sincerely,

A handwritten signature in black ink that reads "Pantelis Michalopoulos" followed by a stylized set of initials "PMR".

Pantelis Michalopoulos
Attorney for EchoStar Satellite Corporation

cc: Deborah Klein
Eloise Gore
Ron Parver